No. 78-929

In the

Supreme Court of the United States

OCTOBER TERM, 1978

VILLAGE OF MAYWOOD, MARK KITCH, EDDIE CARTER and LEO GRAHAM,

Petitioners,

vs.

GERALDINE STERLING, individually and as next friend and mother of DAMON STERLING, SHAMAI STERLING, KIP STERLING and TIMOTHY JONES, Minors,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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CITATIONS TO OPINIONS BELOW

The order and opinion of the U. S. District Court Judge are unreported and are set forth in the appendix hereto, page 1a *et seq.* The opinion of the United States Court of Appeals for the Seventh District is reported at 579 F.2d 1350 (7th Cir. 1978).

QUESTION PRESENTED

Did the Seventh Circuit correctly decide that a municipality cannot refuse to provide water service to a tenant because of his landlords' unpaid water bill?

STATEMENT OF THE CASE

The petitioner's statement of the case accurately reflects the procedural history of the case (petition pages 6 and 7). However, the factual statement contains matters not considered by the United States Court of Appeals for the Seventh Circuit. As noted by the Seventh Circuit "[our] factual inquiry is limited to those facts alleged in the complaint and, therefore, we cannot consider the various depositions included by both parties in the record or appeal. *Kirke* v. *Texas Co.*, 186 F.2d 643, 647 (7th Cir. 1951)." *Sterling et al.* v. *Village of Maywood, et al.* supra at 1351 N. 2 (7th Cir. 1978). The Court concluded that, "since the district court dismissed plaintiff's complaint for failure to state a cause of action, we must accept as true its factual allegations." id at 1351 n. 2.

The facts set forth in the complaint are simple. On or about July 21, 1976 plaintiff entered into an oral lease of a single family residence, pending the proposed sale of the premises from the landlord to plaintiff. Complaint par. 10. Subsequently, the landlord sought to evict plaintiff and to that end on August 5, 1976 he asked the Village of Maywood to shut off the water. Complaint par. 13. On Friday, August 6, a meter reader from the Village of Maywood came to the premises to read the water meter. He also told Mrs. Sterling to go to the Village Hall to have future water bills placed in her name. Complaint par. 14. On Saturday, August 7, she received a water bill addressed to "Occupant." The bill stated that $439.06 was due by August 25, 1976. The bill also contained a note stating "Please come to the office to pay your water deposit and give us your name for our records so that we do not have to shut off the water." Complaint par. 15.

On Monday morning, August 9, the Village of Maywood shut off Mrs. Sterling's water. Complaint par. 16. On August 9, Mrs. Sterling contacted the Village and offered to pay that portion of the bill which was hers, to pay all future service and to pay a deposit to guarantee such service. Complaint par. 17.

The Village, by its employees Kitch, Graham and Carter, refused to provide water service to Mrs. Sterling and her 4 minor children until she paid the landlord's bill of $439.06 (overdue for several years). Complaint par. 19. Four days later, the water service was restored, after the filing of this action.

ARGUMENT

I. PETITIONERS HAVE NOT ESTABLISHED SUFFICIENT REASONS FOR THE GRANTING OF CERTIORARI.

The petitioners contend that this Court should grant their petition for certiorari to review the decision of the Seventh Circuit. Yet they fail to establish sound reasons, pursuant to Rule 19 of the Rules of The United States Supreme Court, why certiorari should be granted.

The petitioners have failed to show that the decision of the Seventh Circuit is in conflict with the decision of another court of appeals on the same matter. In fact the petitioners agree that the decision below conforms with decisions rendered earlier by the Third Circuit,[1] Fifth Circuit[2] and the Sixth Circuit.[3] Nor have the petitioners shown where the decision is in conflict with an applicable state law. Nowhere do the petitioners discuss a state statute or municipal ordinance which prohibits the Village of Maywood from providing water service to an applicant, where a third person owes the bill.

Nor do the petitioners contend that the decision conflicts with Illinois case law on this point. The only Illinois decision cited is a decision regarding a privately owned utility. *Barry* v. *Commonwealth Edison,* 374 Ill. 473, 29

[1] *Koger* v. *Guarino,* 412 F.Supp. 1375 (E.D. Pa. 1976), aff'd 549 F.2d 795 (3rd Cir. 1977)

[2] *Davis* v. *Weir,* 497 F.2d 139 (5th Cir. 1974).

[3] *Craft* v. *Memphis Gas, Light & Water Div.,* 534 F.2d 684 (6th Cir. 1976). Aff'd. *Memphis Gas, Light & Water Div.* v. *Craft,* ..... U.S. ....., 98 S.Ct. 1554, 56 L.E.D. 2d 50 (1978).

N.E.2d 1014 (1940). This court has ruled the Fourteenth Amendment inapplicable to privately owned public utilities. *Jackson* v. *Metropolitan Edison,* 419 U.S. 345 (1974). Further, *Barry* does not even concern the refusal of the utility to provide service to a tenant, because of a bill owed by the landlord.

Finally, this matter is not a fully developed factual situation which would be best suited for this court to render a decision which would be contrary to the growing trend among the circuit courts. Plaintiffs' complaint was dismissed for failure to state a claim. Thus, the factual situation set forth is cursory at best. There is no evidence in the record which would concern the policy and practice of the defendants in other similar situations, whether the Village officials knew Mrs. Sterling was living at the premises, whether Mrs. Sterling was a valid tenant or purchaser of the property and the culpability of the various parties. Additionally, petitioners contend that the refusal to restore service is more convenient, economical and successful than all other methods of collection. However, there has been no evidence introduced upon which this court could base such a finding.

The importance of this court reaching a decision on the merits of this matter is problematic at best. It would appear to promote the judicial economy of this court to deny the petition until such time as the petitioner can establish by competent evidence that they have an important interest to protect. The best method to accomplish this end is to deny the petition and permit the petitioners to present their evidence at the trial level.

II. THE SEVENTH CIRCUIT CORRECTLY DECIDED THAT THE REFUSAL TO PROVIDE SERVICE TO TENANTS BECAUSE OF UNPAID BILLS OF THEIR LANDLORD VIOLATED THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT.

The Seventh Circuit decided that "plaintiff's allegations are sufficient to state a violation of both her equal protection and due process rights . . ." Supra at 1355.

The Seventh Circuit found that the action of the petitioners created two classes of applicants for water service. Those who had landlords who owed past due bills were denied service, unless they paid their landlord's back due bill (whether or not the tenant used any or all of the water). All other applicants were not required to pay anybody else's bill.

As posed by the court below, the issue was whether the classification is rationally related to the legitimate governmental purpose of collecting unpaid water bills. See e.g. *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

Petitioner contends that the aforesaid classification is the most convenient, expeditious, economical and successful collection method. This argument was similarly issued before the Fifth Circuit in *Davis* v. *Weir*, 497 F.2d 139 (5th Cir. 1974). Rejecting this argument, the court decided that:

> "No one could doubt that the Department's methods are calculated to expedite the liquidation of unpaid bills. A collection scheme, however, that divorces itself entirely from the reality of legal accountability for the debt involved, is devoid of logical relation to the collection of unpaid water bills from the defaulting debtor. The city has no valid governmental interest in securing revenue from innocent applicants who

> are forced to honor the obligations of another or face constructive eviction from their homes for lack of an essential to existence—water. The fact that a third-party may be financially responsible for water service provided under a prior contract is an irrational, unreasonable and quite irrelevant basis upon which to distinguish between otherwise eligible applicants for water service." id. at 144.

This argument was also rejected in *Koger* v. *Guarino*, 412 F.Supp. 1375 (E.D. Pa. 1976), aff'd. 549 F.2d 795 (3rd Cir. 1977) and *Craft* v. *Memphis Gas, Light & Water Div.*, 534 F.2d 684 (6th Cir. 1976), aff'd. *Memphis Gas, Light & Water Div.* v. *Craft*, ... U.S. ....., 98 S.Ct. 1554, 56 L.E. 2d 50 (1978). In other contexts, courts have often rejected the notion that conduct or lack of conduct by third persons should subject an innocent party to liability or stigma. See e.g. *Gardenia* v. *Norton*, 425 F.Supp. 922 (D. Conn. 1976); *Townsend* v. *Swank*, 404 U.S. 282 (1971).

Essentially, the petitioners justify the denial of water[4] by administrative convenience. However this court has

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[4] The necessity of water cannot be overestimated. As stated in *Koger* v. *Guarino:*

> an urban home without water and sewage is not fit for human habitation. Indeed, water is an absolute necessity of life and we cannot envision any more serious individual consequences than those which flow from its deprivation.
>
> The defendants are the only source of water supply in the City of Philadelphia, having assumed the obligation to provide such service. An urban residence usually does not have an alternate source of water and sewage service . . . a water user's concern in continual water service cannot be rectified by future payments of deprived benefits. Certainly, the consequence which flows from the termination of water service exceeds the deprivations which may flow from the seizure of other consumer goods. Supra at 1388.

rejected this justification where the classification discriminates insidiously. *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974). "[A]lthough efficacious administration of governmental programs is not without some importance, the Constitution recognizes higher values than speed and efficiency." *Frontiero* v. *Richardson,* 411 U.S. 677, 690 (1973).

Nor have the petitioners established that protection of the water revenue bonds will be measurably enhanced by this procedure. As the Fifth Circuit stated,

> in view of the concededly small number of similar applicants, the miniscule percentage of the Department's revenue that is affected, the minimal cost of instituting constitutionally sufficient procedures, and the availability of other collection methods, we hold that the City has failed to demonstrate any substantial detriment to its revenue bond rating.

Davis v. *Weir,* supra at 145. In the present case, the lower courts have never heard any testimony nor received any evidence which would demonstrate harm to the water revenue.[5]

The Seventh Circuit also found that the refusal to reinstate service to Mrs. Sterling because she didn't have a written lease violated the due process clause.

The basis for the decision was that the Village ordinance permitted any person to receive water service if the applicant "has complied with all the ordinances of the Village and has paid all fees, a permit shall then be issued . . . Ord. No. 68-13 §32.1."

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[5] On the other hand the deposition of petitioner Graham shows that the Village of Maywood has never cut off water service where a tenant was residing on the premises. Therefore the cumulative harm to the Village's revenues is negligible.

The respondent offered to pay all the fees, but she was denied because she didn't have a written lease. Thus, the petitioners attempted to create an additional qualification which is not set forth in the Village ordinances.

The Due Process Clause is violated when a state entity adds unwritten requirements. See e.g. *White* v. *Roughton,* 530 F.2d 750 (7th Cir. 1977). "Such a procedure [determining eligibility on their own unwritten personal standards] vesting virtually unfettered discretion in Roughton and his staff, is clearly violative of due process." Id at 754. See also *Holmes* v. *New York City Housing Authority,* 398 F.2d 262 (2nd Cir. 1968).

Since it is apparent that petitioners' conduct on its face violates the due process and equal protection clauses, respondents should be given an opportunity to present their evidence to establish such violations.

CONCLUSION

Based upon the foregoing, respondents pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

by: JOSEPH BURDEN

One of Respondents Attorneys

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APPENDIX

IN THE

UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

No. 76 C 2991

GERALDINE STERLING, et al.,

Plaintiffs,

v.

VILLAGE OF MAYWOOD, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

The court has reviewed plaintiffs' complaint and finds that the plaintiffs have attempted to establish a federal claim out of what is essentially a landlord and tenant problem. The court finds that the allegations set forth in the complaint do not properly state a claim upon which relief can be granted under 42 U.S.C. §1983, §1985(3) or the Fourteenth Amendment of the United States Constitution. The court, therefore, sua sponte, dismisses plaintiffs' complaint for failure to state a claim upon which relief can be granted.

ENTER:

/s/ Frank J. McGarr
Frank J. McGarr

United States District Judge

Dated: April 15, 1977